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## Family Law and Gay and Lesbian Family Issues in the Twentieth Century

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# Family Law and Gay and Lesbian Family Issues in the Twentieth Century

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At the beginning of the twentieth century, the phrase “homosexual family” or “lesbian family,” if intelligible at all, would have seemed an oxymoron. Two men (or women) who openly broadcast that they were lovers and wanted to marry or adopt a child would have been jailed or hospitalized. By the end of the century, in many places in this country, the situation is quite different. The same couple still could not marry under the law, but they could register their relationship as “domestic partners” and adopt a child together. They might celebrate their commitment in a church full of family and friends and their employers might provide them health benefits as a family. At the same time, in other places in this country, the same couples’ situation would be little different than it was at the beginning of the century. Their lovemaking would remain illegal, they could secure no legal recognition of their relationship, and they would be ineligible to adopt a child individually or as a couple. If they walked down the street holding hands, they would probably be taunted and might be threatened with physical injury.

Issues bearing on the family lives of gay people now regularly arise in nearly all American states, in legislatures and in the courts. It is possible to speak of a corpus of family law applying especially to lesbians and gay men, some of it quite favorable to gay people, some of it quite negative. All of these legal developments have occurred in the

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last third of the twentieth century, triggered in the 1960s by the movement for gay liberation. The beginnings of rapid social change are typically ascribed to an incident in June 1969, when gay bar patrons, many of them drag queens, fought back with uncharacteristic violence against the New York vice squad conducting a routine raid on the Stonewall Inn in Greenwich Village. In the aftermath and in a social context that included an established civil rights movement, a developing movement for women's liberation, and changing sexual mores, lesbians and gay men began forming organizations dedicated to transforming their cultural and political status. Increasing numbers of lesbians and gay men were willing to be open and to proclaim themselves both normal and proud. The country's first Gay Pride march took place on the first anniversary of the "Stonewall rebellion," and for the past thirty years Gay Pride demonstrations have occurred every June in both large and small American cities.

Over these thirty years, lesbians and gay men have increasingly challenged conventional definitions of marriage and the family. In this brief article, we tell the story of gay people and family law in the United States across this period. We divide our discussion into two sections: issues regarding the recognition of the same-sex couple relationship and issues regarding gay men and lesbians as parents. These issues overlap, of course, but since family law discussions commonly treat adult-adult issues of all sorts separately from parent-child issues, we believe it convenient and helpful to do so as well.

## **I. The Recognition of the Same-Sex Couple Relationship**

### *A. The Marriage Cases*

Thirty years ago, in 1970, few gay and lesbian couples lived openly in the United States, except in enclaves in New York, San Francisco, and a few other cities. Despite this, in the early 1970s, some lesbian and gay male couples, captured by the spirit of Stonewall and the movement it spawned, presented themselves at city clerk's offices and demanded a marriage license. Close to a dozen couples requested licenses—and three couples, in Minnesota, Washington, and Kentucky, followed the clerk's refusal by going to court. They argued that their states' marriage statutes, gender neutral on their face, should be read to permit marriage by two persons of the same sex and alternatively that, if the statutes were construed to limit marriage to opposite-sex couples, they must be held unconstitutional as a denial of equal pro-

tection and of the fundamental right to marry. All trial and appellate courts rejected the plaintiffs' claims,<sup>1</sup> dismissing the statutory and constitutional claims essentially by asserting that marriage just *is* the union of one man and one woman. In their view, it was as preposterous for a man to argue that he had a right to marry another man as it would be for him to argue that he had a right to get pregnant.

The plaintiffs who brought the Minnesota and Washington cases, looking back today, acknowledge that at the time of filing they realized that there was almost no possibility that the courts would hold in their favor.<sup>2</sup> They demanded licenses primarily as a way to gain attention for gay and lesbian issues and to assert the normalcy of same-sex relationships. By that measure they were highly successful. They attracted a substantial amount of news attention across the country. The Minnesota couple, for example, was featured in a warmly positive three-page spread in *Look Magazine*, a widely read photo magazine of general circulation, as part of an issue devoted to the American Family. They were "The Homosexual Couple," sandwiched between articles on two other growing and culturally unsettling groups—"The Young Unmarrieds" and "The Executive Mother."

From the mid-1970s until the late 1980s, no gay male or lesbian couples in the United States appear to have requested a marriage license or filed a case demanding a right to one. As William Eskridge has commented, many feminist and some other activists rejected marriage as an oppressive institution, and others gave same-sex marriage a low priority because other political and legal issues seemed more pressing and because none of the litigation from the 1970s had produced even minimally promising results.<sup>3</sup> Litigation looked even less promising in the 1980s than it had in the 1970s. In 1986, the Supreme Court decided *Bowers v. Hardwick*,<sup>4</sup> upholding the constitutionality of state criminal sodomy laws, and the majority opinion's hostile tone convinced many that federal constitutional protection for gay people in any aspect of their sexual or loving relationships was unattainable. In 1988, for example, a state judge in Indiana not only denied two gay prison inmates a license to marry but also fined them \$2,800, declaring that their

1. *Baker v. Nelson*, 191 N.W. 2d 185 (Minn. 1971); *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. Ct. App. 1973); *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974).

2. One of the authors, David Chambers, interviewed Jack Baker, a plaintiff in the Minnesota case, in January 1999, and, in separate conversations, John Singer (now Fayege ben Miriam) and Paul Barwick, the plaintiffs in the Washington case, in July 1998.

3. WILLIAM N. ESKRIDGE, *THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* 57 (1996).

4. 478 U.S. 186 (1986).

“claims about Indiana law and constitutional rights are wacky and sanctionably so.”<sup>5</sup>

The 1980s also marked the beginning of an alternative strategy for the recognition of gay couples and nontraditional family relationships—the move toward municipal and state recognition of domestic partnership. The development of domestic partnership is discussed later.

In the early 1990s, a number of gay people, unaware of the earlier cases or undeterred by them, became insistent about state recognition of their relationships. Same-sex couples applied for licenses at clerk’s offices in Hawaii, Alaska, New York, the District of Columbia, and Vermont and, when denied, filed cases in state courts. Of these, the Hawaii case, *Baehr v. Lewin*, stirred by far the most attention, for it led to the first appellate decision in the United States suggesting that same-sex couples were constitutionally entitled to marry and produced a seismic political reaction in Hawaii and the mainland.

The early stages of the Hawaii litigation resembled the cases filed in the 1970s. The plaintiffs’ attorneys made the same constitutional arguments, the trial court rejected each of them, and the plaintiffs appealed to the state supreme court. The surprise occurred in May 1993 when the Hawaii Supreme Court reversed. Relying on a provision of the Hawaii Constitution that prohibits discrimination based on sex, the court held that the state’s statutory barrier to same-sex marriage presumptively denied the plaintiffs the equal protection of the laws.<sup>6</sup> The court drew on *Loving v. Virginia*, the U.S. Supreme Court case striking down anti-miscegenation laws and reasoned that since the Hawaii statute permitted men to marry women but prohibited women from marrying women, the statute constituted unconstitutional discrimination based on sex, unless the state could demonstrate a compelling reason for limiting marriage to persons of the opposite sex. The court remanded the case to the trial court for a hearing at which the state would be permitted to demonstrate a compelling interest.

Political reverberations began in Hawaii as soon as the Hawaii Supreme Court rendered its decision. Between 1993 and 1997, every session of the Hawaii Legislature produced new responses to the prospect of gay marriage. Within months of the Supreme Court decision, the legislature passed a statute restating that marriage was the union of one man and one woman and reasserting the legislature’s authority to define marriage in this manner. In the same statute, the legislature established

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5. See WILLIAM RUBENSTEIN, *LESBIANS, GAY MEN AND THE LAW* 418 n. 3 (1998).

6. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

a Commission on Sexual Orientation and the Law to make recommendations regarding the rights and benefits that same-sex couples should have. The statute directed that the commission, when appointed, include members representing the Mormon and the Roman Catholic Churches, both denominations strongly opposed to the recognition of same-sex unions. The next year, after the provision regarding church representation was held unconstitutional by the state courts, the legislature created a smaller commission with much the same mission. The commission issued a report in December 1995 that, contrary to the expectations of the legislature, recommended, by a split vote, that the legislature legalize same-sex marriage or, in the alternative, adopt a domestic partnership law according same-sex couples most of the rights of married couples.

The waves caused by the Hawaii decision also traveled from the islands to the mainland. Both the advocates for same sex marriage and conservative opponents realized that if lesbians and gay men obtained the right to marry in Hawaii, couples from around the United States would fly there to do so. States would then have to decide whether to recognize the Hawaii marriages when their residents returned home after marrying. Conservative groups provided friendly legislators in every state with draft legislation that directed their state's courts and other agencies to refuse to recognize a marriage between two persons of the same sex. By mid-1999, twenty-nine states had adopted non-recognition legislation, and bills or referenda were pending in eight others, including California and New York.<sup>7</sup>

In 1996, the U.S. Congress enacted federal legislation in response to the Hawaii decision.<sup>8</sup> In its two substantive sections, the Defense of Marriage Act (DOMA) limits the effects of any state's decision to permit same-sex couples to marry. The first section asserts Congress's authority to enforce the Full Faith and Credit Clause of the U.S. Constitution and declares that states need not recognize the marriage of two people of the same sex even if the marriage was validly contracted in another state. Many legal scholars believe that this section is unconstitutional.<sup>9</sup> The second, one that may well prove more consequential in the long term, provides that all federal legislation and regulations that

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7. See "Legislative Reactions to Suits for Same-Sex Marriage," <<http://www.buddybuddy.com>>.

8. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified as 28 U.S.C. § 1738C and 1 U.S.C. § 7).

9. See, e.g., Barbara Cox, *Same-Sex Marriage and Choice of Law: If We Marry in Hawaii, Are We Still Married When We Return Home*, 1994 Wis. L. REV. 1033.

mention married persons or spouses shall be read as applying only to persons in opposite-sex marriages.

In ugly hearings leading up to the enactment, members of Congress and witnesses forecast that if men could marry men they would soon be permitted to marry children and other animals. Several witnesses and lawmakers feared the collapse of Western Civilization. Senator Jesse Helms believed that the same-sex marriage movement threatened "the moral and spiritual survival of this Nation."<sup>10</sup> Representative Steve Largent warned that "the crosshairs of the homosexual agenda" were aimed at the institution of marriage.<sup>11</sup> The bill passed by a wide margin in each chamber and the President signed it into law.

Our nation is a federalist system. In all of American history there have been few occasions when states or the Congress have reacted with the sort of hostility to the actions of the courts or legislatures of another state that occurred in response to *Baehr*. In the years before the Civil War, somewhat similar hostility was directed at the decisions of judges in New England who refused to return fugitive slaves to their southern owners. And in the middle of this century, many states sought ways to refuse to recognize divorces granted under Nevada's lax laws. That same-sex marriage has stirred so much resistance is a measure of the importance that so many Americans attach to a traditional vision of marriage and of the continued reluctance of many Americans to accept lesbians and gay men into the American mainstream.

DOMA was signed into law in September 1996. Shortly thereafter, the Hawaii trial court conducted the hearing on remand mandated by *Baehr v. Lewin*, at which the state was given the opportunity to demonstrate a compelling interest in limiting marriage to opposite-sex couples. The state offered many arguments for limiting marriage to persons of the opposite sex but seriously advanced only one of them: that if gay people were permitted to marry, it would lead to their greater participation in childrearing, which would be undesirable because children can be best raised by couples composed of one adult of each sex. Each side put on several expert witnesses, but even the witnesses for the state acknowledged that most gay men and lesbians raising children performed in a fully satisfactory manner. In December 1996, the trial judge ruled that the state had failed to demonstrate the necessity of limiting marriage to opposite sex couples in order to assure that children were

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10. See 142 CONG. REC. S10,068 (daily ed., Sept. 9, 1996).

11. *Defense of Marriage Act: Hearing on S. 1740 Before the Senate Committee on the Judiciary*, 1996 WL 387295 (July 11, 1996) (Rep. Largent, the bill's sponsor, spoke at the Senate hearings in support of the bill.)

satisfactorily nurtured.<sup>12</sup> The judge found that “children of gay and lesbian parents and same-sex couples tend to adjust and develop in a normal fashion” and that “in Hawaii, and elsewhere, same sex couples can, and do, have successful, loving and committed relationships.” The case was appealed again, this time by the state.

In 1997, responding to the trial court’s decision on remand, the Hawaii Legislature approved a constitutional amendment that was submitted to the voters at the elections in November 1998. Adopted by a landslide majority of 70 percent, the amendment gave the legislature the power to limit marriage to persons of the opposite sex. The case is still before the Hawaii Supreme Court, with the parties disagreeing over whether new legislation is required of the legislature or whether the old legislation that limits marriage to persons of the opposite sex has been revived and validated by the adoption of the amendment. At this time, the Court has not reached a decision and the legislature has not acted to repress the marriage statute.

Of the other cases filed in the 1990s challenging the restriction on same-sex marriage,<sup>13</sup> the only one that survives with a plausible chance of a ruling for the gay couples is in Vermont. There, a trial judge ruled against the plaintiffs, but, as this essay goes to press, the case is awaiting decision by the Vermont Supreme Court. In oral argument, most of the justices seemed quite sympathetic to the plaintiffs’ arguments.

### *B. The Domestic Partnership Movement*

As early as the 1970s, some gay people began searching for mechanisms other than marriage to secure legal recognition of their relationships. Some gay men, for example, went to court and adopted their partners, since adoption seemed to be the only available mechanism other than marriage by which one person can form a legally recognized familial relationship with another person. Even though such adoptions have often been approved by family courts over the years (perhaps

12. Baehr v. Miike, 1996 WL 694235 (Haw. Cir. Ct. 1996).

13. The Alaska case produced a victory for the plaintiffs in the trial court, with a holding that the statute limiting marriages to persons of the opposite sex violates gay persons fundamental right to marry (*Brause v. Bureau of Vital Statistics*, 1998 WL 88743), but Alaska’s legislature responded by proposing a constitutional amendment to limit marriage to one man and one woman and Alaska’s voters adopted the amendment in 1998 by about the same margin as Hawaii. The plaintiffs in the District of Columbia case lost in both the trial and appellate court. *Dean v. District of Columbia*, 653 A.2d 307 (D.C. Ct. App. 1995). The New York case was dismissed on appeal (*Storrs v. Holcomb*, No. 80174 (N.Y. App. Div., Dec. 24, 1998)) and has been refiled.



because they have been uncontested),<sup>14</sup> few gay men and even fewer lesbians have adopted their partners. The symbolism is unappealing to most people—parent and child, not a relationship of partners. In addition, the adoption of one adult by another secures for the couple only some of the legal benefits that marriage would offer.

The lack of legal recognition of lesbian and gay couple relationships led advocates to invent a new status, commonly referred to as “domestic partnership.” Broadly speaking “domestic partnership” takes either or both of two forms. The first involves a public registration system for same-sex and sometimes unmarried opposite-sex couples. At its purest, the registration carries no benefits. Instead, it simply provides public recognition of the worthiness of the relationship between same-sex or unmarried partners. The first domestic partner registration was adopted by city ordinance in West Hollywood, California, in 1983.

The second form of domestic partner recognition focuses on a particular benefit available to married persons or couples and secures the same benefit for same-sex couples. Health benefits are the most widely sought. In 1985, Berkeley, California, became the first public employer to offer health benefits to the same-sex partners of their employees. Piecemeal efforts to secure legal benefits for domestic partners have taken other forms as well. In a celebrated case, for example, the New York Court of Appeals held that a regulation that permitted members of a tenant’s “family” to remain in a rent-controlled apartment after the death of the tenant should be interpreted to include the tenant’s long-term same-sex partner.<sup>15</sup>

The spread of domestic partner registration and benefits has produced substantial tangible benefits for tens of thousands of gay men and lesbians over the past decade. In the late 1980s and 1990s, at least one municipality or county in over half the states adopted some form of domestic partner registration and many provide benefits to their employees’ partners. Registration and benefits for public employees have been adopted in academic communities like Ithaca, Cambridge, and Ann Arbor and large cities including New York, Chicago, Los Angeles, and Seattle. Benefits have also been provided by large counties such as Alameda County, California, and Wayne County, Michigan. San Francisco adopted both registration and partner health benefits in the early 1990s and has now gone farther than any other city by requiring

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14. See, e.g., *In re Adoption of Adult Anonymous*, 435 N.Y.S.2d 527 (N.Y. Fam. Ct. 1981). But see *In re the Adoption of Robert Paul P.*, 471 N.E.2d 424 (N.Y. 1984) (denying adoption).

15. *Braschi v. Stahl Assocs. Co.*, 543 N.E.2d 49 (N.Y. 1989).

that employers who contract with the city also provide partner benefits to their employees.<sup>16</sup>

Hawaii, in 1997, became the first *state* to adopt partner registration, calling the couple not “domestic partners” but “reciprocal beneficiaries” and permitting persons in a wide range of relationships to register. The Reciprocal Beneficiaries Act provides to registering couples a significant number of the rights that married couples receive under state law, such as intestate succession, joint tenancy, and some employer-provided health benefits.<sup>17</sup> Hawaii’s extension of some of the benefits of marriage to same-sex couples is a more significant step than it might at first appear, since most legal benefits and responsibilities of marriage are fixed by state law, not by city or county ordinances. As of mid-1999, four states provide some form of partner benefits to their employees.<sup>18</sup>

The actions of cities and counties in providing benefits to the unmarried partners of employees have spread to public and private universities and private businesses. Scores of public and private colleges and universities now offer partner benefits to employees with same-sex partners. The movement among large private employers has been equally swift and extensive. A 1997 survey reported that about a quarter of American companies with over 5,000 employees offer partner benefits.<sup>19</sup>

### C. Concluding Observations About the Recognition of Same-Sex Couples

Few states, if any, will permit same-sex couples to marry until a fundamental reconception of gay relationships occurs in this country—a conception of gay peoples’ loving relationships as equal in moral worth to those of heterosexuals. On the other hand, permitting various forms of domestic partnership seems to require less of a shift. It is occurring widely today despite the opposition of many conservatives who reject recognizing gay families in any manner. Domestic partnership as an approach avoids the use of the term “marriage” and adopts

16. See Nancy Knauer, *Domestic Partnership and Same-Sex Relationships: A Marketplace Innovation and a Less than Perfect Institutional Choice*, 7 TEMP. POLITICAL & CIVIL RTS. L. REV. 337, 341 (1998).

17. After the bill was enacted, the state attorney general ruled that private employers could not be required to provide health benefits. A federal district court upheld the Attorney General’s decision.

18. Hawaii, New York, Oregon, and Vermont. See Lambda Legal Defense and Education Fund website, <<http://www.lambdalegal.org>>. In October 1999, California began permitting domestic partners to register.

19. See Knauer, *supra* note 16, at 339.

a course that is flexible and incremental. As Hawaii's Reciprocal Beneficiary law demonstrates, it is possible to start by extending to same-sex couples the least threatening of benefits and responsibilities.

Several countries in northern Europe have moved quite far along this route. In 1989, Denmark adopted a Registered Partnership Act that permitted same-sex couples to register with the state and obtain all of the benefits of marriage except the name and the opportunity to adopt children (which is also denied to unmarried heterosexual couples). In 1999, Denmark amended the law to permit registered partners to adopt each other's children. Iceland, Finland, Sweden, Norway and the Netherlands have also adopted registered partnership legislation. In June 1999, the Dutch Cabinet approved legislation extending full marriage to same-sex couples, and the bill is expected to become law by the end of 2000. Perhaps, over the century that we have just inaugurated, a similar progression from domestic partnership to marriage will occur in the United States.

## **II. The Parent-Child Relationship**

Many gay men and lesbians have children. They have them in the course of marriages and other relationships with a person of the opposite sex. They have them, by artificial insemination or adoption, when single or during relationships with a same-sex partner. There is very little statutory law explicitly addressing the gay parent. Lesbians and gay men who are parents or who want to become parents come into contact with the law in the same way that most heterosexuals do: when they divorce or become involved in a custody struggle with another person who claims the rights of a parent and when they apply for adoption or seek to become foster parents. Over the last thirty years, as more and more women and men have revealed themselves as lesbian or gay, these encounters with the legal system have become more frequent.

A parent's homosexuality was explicitly acknowledged in a handful of reported cases going back to 1952,<sup>20</sup> but custody cases involving a homosexual parent first began appearing with some frequency in the early and mid-1970s, as the women's liberation movement and changing attitudes towards divorce made it easier for all women to leave marriages and as the gay liberation movement enabled substantial numbers of gay men and lesbians to embrace an identity they had earlier been taught to despise.

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20. *Commonwealth v. Bradley*, 91 A.2d 379 (Pa. Super. Ct. 1952).

When the cases first arose in the 1970s, courts applying the prevailing "best interests of the child" standard ruled both for and against lesbian and gay parents. For example, in 1972, a lesbian couple in Seattle was permitted to keep custody of six children between them, despite a joint effort by the children's fathers to secure a modification.<sup>21</sup> Other states with decisions for a gay parent in the mid-1970s included California, Maine, Ohio, Oregon, and South Carolina.<sup>22</sup> In the first, and still one of the few, victories for transsexual parents, in 1973 a Colorado appeals court told a trial court it was wrong to remove custody of four children from a mother simply because she had undergone a sex change operation and become a man.<sup>23</sup>

Unsurprisingly, during the same period, cases in which lesbian mothers lost custody of their children were more numerous. For example, an Oregon case involved a custody struggle between a father and a lesbian mother over three children, ages fifteen, twelve, and ten. All of the children wanted to live with the mother and her partner. The judge permitted the oldest to live where she wished, but ordered the younger two into the custody of their father. When the younger children ran away and later told the judge they would not live with their father, the judge placed them in a juvenile detention center and subsequently with their married half-sister. In an Ohio case, a judge found the father unfit because he had once attempted suicide in front of the children, but awarded custody to the paternal grandmother, who had not testified in the case nor expressed a willingness to raise the children, rather than place them with their lesbian mother.<sup>24</sup>

Several developments in the early 1970s assisted legal advocates for lesbian and gay parents. The 1970 Uniform Marriage and Divorce Act, responding to changing sexual mores and disavowing the decades-old rule that an adulterous parent was unfit to be a child's custodian, provided that "the court shall not consider conduct of a proposed custodian that does not affect his relationship to the child."<sup>25</sup> Additionally, in 1973, the American Psychiatric Association removed homosexuality from its Diagnostic and Statistical Manual of mental disorders.<sup>26</sup> Shortly there-

21. *Schuster v. Schuster and Isaacson v. Isaacson*, 585 P.2d 130 (Wash. 1978).

22. Many of these early cases are discussed in Nan D. Hunter & Nancy D. Polikoff, *Custody Rights of Lesbian Mothers: Legal Theory and Litigation Strategy*, 25 BUFF. L. REV. 691 (1976), and Rhonda R. Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L. J. 798 (1979).

23. *Christian v. Randall*, 516 P.2d 132 (Colo. Ct. App. 1973).

24. See cases discussed in Hunter & Polikoff, *supra* note 22, and Rivera, *supra* note 22.

25. Uniform Marriage and Divorce Act, 9 U.L.A. 288 (1979).

26. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 380 (3d ed. 1980).

after, in 1976, the American Psychological Association passed a resolution opposing use of sexual orientation as a primary component in custody, adoption, or foster parenting determinations.<sup>27</sup>

Although custody and visitation were the principal parenting issues gay men and lesbians faced in the 1970s, issues of adoption and foster parenting first surfaced then. Shortly after its founding in 1973, the National Gay Task Force, in conjunction with New York City child welfare agencies, developed a network of gay foster homes for homeless gay teenagers who were not functioning well in city group homes.<sup>28</sup> Although the extent of such programs is not well documented, New York's was not the only one.<sup>29</sup>

During the mid-1970s, on the legislative front, the leaders of the burgeoning gay rights movement sought civil rights ordinances in many cities. Meanwhile, divorce and custody laws were being reformed, often along the lines proposed in the Uniform Marriage and Divorce Act. Advocates in the District of Columbia, after obtaining inclusion of sexual orientation in a broad anti-discrimination law passed in 1974, succeeded two years later in adding sexual orientation to the list of factors prohibited from determining custody and visitation. The 1976 law remains the only statutory protection for gay and lesbian custody in the country.<sup>30</sup>

In 1977, a backlash began against the anti-discrimination protections won by the gay rights movement. The first success of the backlash was a referendum held on June 7, 1977, repealing a Dade County, Florida gay rights ordinance. The next day, Florida's governor signed into law a ban on adoption by lesbians and gay men, the first such statewide ban.<sup>31</sup> In spite of the backlash, custody and visitation cases toward the end of the 1970s continued to produce victories as well as defeats. In what remains one of the most eloquent expressions of the positive aspects of having a lesbian mother, a New Jersey appellate court reversed a trial court order removing the children from their lesbian mother,

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27. John J. Conger, *Proceedings of the American Psychological Association Inc, for the Year 1976*, 32 AM. PSYCHOL. 408, 432 (1977).

28. Lucinda Franks, *Homosexuals as Foster Parents: Is New Program an Advance or Peril?*, N.Y. TIMES, May 7, 1974, p. 47.

29. In 1974, a Washington State judge approved the placement of a gay teenager with gay foster parents. A year later, however, another Washington State judge denied such a placement, siding with the child's father, who opposed it. In spite of favorable testimony from social workers, juvenile parole officers, a psychiatrist, and a psychologist, the judge reasoned that "substituting two male homosexuals for parents does violence not only to the literal definition of who are parents but offends the traditional concept of what a family is." These cases are discussed in Rivera, *supra* note 22, at 907-08.

30. D.C. CODE ANN. § 16-914(a)(1) and § 16-911(a)(5)(1981).

31. FLA. STAT. ANN. § 63.042(3) (West 1985 and Supp. 1995).

reasoning in part that children could benefit from being raised by a gay or lesbian parent. He stated,

[These children may] emerge better equipped to search out their own standards of right and wrong, better able to perceive that the majority is not always correct in its moral judgments, and better able to understand the importance of conforming their beliefs to the requirements of reason and tested knowledge, not the constraints of currently popular sentiment or prejudice.<sup>32</sup>

During the late 1970s, the first mental health research on the well-being of children raised by lesbian mothers was published. Using expert witnesses, advocates were in a better position to dispel recurring myths about lesbians as mothers—that lesbians were mentally ill or emotionally unstable; that a lesbian mother was likely to sexually molest her child or engage in sexual behavior in front of her child; that children raised by lesbian mothers would probably become gay or lesbian, would be confused about their gender identity, would be socially stigmatized, or would suffer other psychological harm.<sup>33</sup>

By the late 1970s, numerous factors coincided to encourage a new form of lesbian and gay parenthood not tied to heterosexual marriage. The gay rights movement enabled many young adults to embrace, rather than reject, their sexual orientation. Many gay men and lesbians who, in an earlier period, would have married a person of the opposite sex out of convention, fear, or denial, no longer did so. While it may have initially appeared that parenthood would never be an option for such men and women, other cultural and medical phenomena soon resulted in a new frame of mind. Specifically, births of out-of-wedlock children no longer carried the stigma they did in earlier decades, and medical technology opened the possibilities for conception without sexual intercourse. Although there are accounts of decisions by lesbian couples to raise children together as far back as 1965,<sup>34</sup> it was at some

32. *M.P. v. S.P.*, 404 A.2d 1256, 1263 (N.J. Super. Ct. App. Div. 1979).

33. See Donna Hitchens & Barbara Price, *Trial Strategy in Lesbian Mother Custody Cases: The Use of Expert Testimony*, 9 GOLDEN GATE U. L. REV. 451 (1978–79).

34. The earliest examples of lesbian couples choosing to raise a child together almost certainly involve conception by one member of the couple through sexual intercourse with a man for the express purpose of becoming pregnant. A 1973 New York Times article about lesbian mothers describes a couple raising an eight year old daughter conceived deliberately with the help of a mutual male friend. Judy Klemesrud, *Lesbians Who Try to Be Good Mothers*, N.Y. TIMES, January 31, 1973, at 46, col. 1. A 1977 custody dispute between a child's nonbiological mother and the biological mother's sister after the biological mother died concerned a child born in 1970 after the biological mother had sexual intercourse with a student she met on vacation. The lesbian couple had contacted an adoption agency in 1968 about adopting a child; when that was unsuccessful they used casual sexual intercourse. *In re Hatzopolous*, 4 Fam. L. Rep. (BNA) 2075 (Dec. 6, 1977).

point in the late 1970s that lesbians in significant numbers, first in the San Francisco area and then around the country, began contemplating planned motherhood, primarily using alternative insemination as the means of conception, but also adopting as individual parents. Into the early 1980s, even as the conservative Christian right emerged and its influence grew, the openness, pride, and numbers of lesbian and gay families also grew.

Meanwhile, the number of reported cases of custody and visitation disputes between a heterosexual parent and a gay or lesbian parent also increased. About twenty states had reported appellate decisions in the first half of the 1980s. Decisions during this period were as mixed as those of the 1970s. In 1980, for example, the Massachusetts Supreme Court ruled that a lesbian mother could not lose her children simply because she had a lifestyle "at odds with the average."<sup>35</sup> The Alaska Supreme Court ruled in 1985 that a mother's lesbian relationship should be considered only if it negatively affected the child and that it was "impermissible to rely on any real or imagined social stigma attaching to mother's status as a lesbian."<sup>36</sup> A 1984 New York appeals court decision also articulated the requirement of an "adverse effect" before a parent's sexual orientation could be a basis for denying custody, and an appellate case the next year lifted a trial court order prohibiting the presence of the father's partner or any other gay person during visitation.<sup>37</sup>

Most courts, however, continued to rule against gay parents. Cases from appellate courts in North Dakota, South Dakota, and Virginia overturned trial court judges who had awarded custody to lesbian, gay, or bisexual parents.<sup>38</sup> In 1985, the Virginia Supreme Court held that a gay parent living with a same-sex partner was *per se* an unfit parent.<sup>39</sup> An Ohio appeals court, imposing more restrictions on a gay father's visitation rights than had the trial court, said the state had a "substantial interest in viewing homosexuality as an arrant sexual behavior which threatens the social fabric, and in endeavoring to protect minors from being influenced by those who advocate homosexual lifestyles."<sup>40</sup>

In the early 1980s, Missouri appellate courts issued three opinions against lesbian and gay parents. In the first of these, for example, a

35. *Bezio v. Patenaude*, 410 N.E.2d 1207 (Mass. 1980).

36. *S.N.E. v. R.L.B.*, 699 P.2d 875 (Alaska 1985).

37. *Guinan v. Guinan*, 477 N.Y.S.2d 830 (1984); *Gottlieb v. Gottlieb*, 488 N.Y.S.2d 180 (1985).

38. *Jacobsen v. Jacobsen*, 314 N.W.2d 78 (N.D. 1981); *Wolff v. Wolff*, 349 N.W.2d 656 (S.D. 1984); *Roe v. Roe*, 324 S.E.2d 691 (Va. 1985).

39. *Roe v. Roe*, 324 S.E.2d 691 (Va. 1985).

40. *Roberts v. Roberts*, 489 N.E.2d 1067 (Ohio Ct. App. 1985).

court changing custody to a heterosexual father compared the presence of the lesbian mother's partner around the children to the presence of "a habitual criminal, or a child abuser, or a sexual pervert, or a known drug pusher."<sup>41</sup> The other two decisions were equally hostile in tone. Before the end of the decade, Missouri appellate courts issued six more decisions ruling against lesbian and gay parents.

In May 1985, neighbors of a gay foster parent couple in Boston went to the *Boston Globe* to express their disapproval. The ensuing publicity sparked widespread national debate about gay men and lesbians raising children. The Massachusetts Department of Social Services removed the children from the home, and changed its policy, issuing regulations that made it almost impossible for lesbians and gay men to become foster parents.<sup>42</sup> In the wake of that controversy, New Hampshire in 1986 enacted a law prohibiting adoption, foster parenting, or ownership of a child care facility by lesbians or gay men. Although the child care facility provisions were struck down as unconstitutional, the bans on adoption and foster parenting were upheld.<sup>43</sup> New Hampshire became the second state with an adoption ban and the first with a legislatively mandated ban on gay foster parenting.

In the latter half of the 1980s, state courts continued to decide substantial numbers of custody disputes between a lesbian or gay parent and a heterosexual parent and continued the prior pattern of widely divergent attitudes toward parenting by lesbians and gay men.<sup>44</sup> During this same period of time, advocates for gay and lesbian parents developed new approaches to protect gay and lesbian families in which, from birth, a child had two parents of the same gender. Lawyers advocated for "second-parent adoption," a term describing the equivalent of a stepparent adoption, in which a biological parent's partner adopts her

41. *N.K.M. v. L.E.M.*, 60 S.W.2d 179 (Mo. Ct. App. 1980).

42. For extensive discussion of the people involved in the Massachusetts foster care controversy, see LAURA BENKOV, *REINVENTING THE FAMILY* 86-98 (1994) and NEIL MILLER, *IN SEARCH OF GAY AMERICA* 121-30 (1989).

43. *In re Opinion of the Justices*, 530 A.2d 21 (N.H. 1987).

44. For example, the Nevada Supreme Court terminated a father's parental rights solely because he underwent a sex change operation, *Daly v. Daly*, 715 P.2d 56 (Nev. 1986), and the Arkansas Supreme Court awarded sole custody to a heterosexual father, reasoning that it was proper to presume the children would be harmed living with their lesbian mother in an "immoral" environment. *Thigpen v. Carpenter*, 730 S.W.2d 510 (Ark. Ct. App. 1987). On the other hand, a New Mexico appeals court overturned a trial judge's refusal to place a neglected child in the custody of his adult brother who was gay. The court reasoned that a proposed custodian's sexual orientation was not enough to conclude that he would be unable to provide a child with a proper environment. *In re Jacinta M.*, 764 P.2d 1327 (N.M. Ct. App. 1988). And during this period, decisions in California and Washington State overturned restrictions on a gay or lesbian parent's visitation rights. See *In re Marriage of Birdsall*, 197 Cal. App. 3d 1024 (1988); *In re Marriage of Cabalquinto*, 718 P.2d 7 (Wash. Ct. App. 1986).



child. The term "joint adoption" was used to designate adoption of a child by both members of a couple, a practice unheard of earlier unless the couple was married. The first second-parent adoption was granted in Alaska in 1985; within months others were granted in Oregon, Washington, and California.<sup>45</sup>

The mid-1980s also saw the first disputes between separating lesbian mothers who had raised a child together, between a surviving non-biological mother and family members of a deceased biological mother, and between a lesbian mother and a semen donor, often a gay man, when disagreements arose about the donor's relationship with the child. These cases would become more prominent in the late 1980s and into the 1990s. In a particularly poignant 1989 case, a trial court judge in Broward County, Florida, awarded custody of ten year old Kristen Pearlman to Janine Ratcliffe, her nonbiological mother, reversing a decision made four years earlier, upon the death of Kristen's biological mother, Joanie, that had granted custody to Joanie's parents. In chambers, the child pleaded with the judge to permit her to live with Janine. The judge found that Kristen continued to view Janine as her primary parent figure, that it would be detrimental to Kristen to continue her separation from Janine, and that there was no evidence Janine's sexual orientation would have any detrimental effect on Kristen.<sup>46</sup>

Although there have been a handful of other cases arising upon the death of a child's only legal parent, disputes about parenthood in planned lesbian and gay families have arisen primarily in two other contexts. The first is a claim by a legally unrecognized parent to continue a relationship with a child when she and the child's biological or adoptive parent separate. The second is a claim by a biological father, usually a semen donor, who demands legal parental status in disregard of an agreement with the lesbian couple that he would not assert parental rights based on biology. These cases have presented courts with two options—recognize planned lesbian and gay families and modify family law principles to protect the interests of parents and children in such families, or maintain a rigid definition of parenthood that often fails to recognize the reality of children's actual relationships with parenting figures. Courts, sometimes claiming that legislative language gave them no choice, have usually taken the latter option. Appellate courts in California and New York, the states with the largest number

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45. These cases are discussed in Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Non-Traditional Families*, 78 GEO. L.J. 459 (1990).

46. *In re Pearlman*, 15 Fam. L. Rep. (BNA) 1355 (Fla. Cir. Ct. 1989).

of planned lesbian and gay families, have both closed the door on all claims by legally unrecognized mothers and recognized the claims of semen donors.<sup>47</sup> Claims by legally unrecognized mothers have also been rebuffed in Ohio, Texas, Florida, and Vermont, without ever reaching the question of the child's best interests.<sup>48</sup> While appellate courts in Wisconsin, New Mexico, and Massachusetts have allowed the non-biological parent to request visitation,<sup>49</sup> these states are in the minority, and even they have not authorized a claim for sole or joint custody by the legally unrecognized parent, even if she was the child's primary caretaker.

The 1990s, like the preceding two decades, were filled with incongruity for lesbian and gay parents. The number of planned lesbian and gay families skyrocketed, bringing broad visibility in the media, in schools, in churches and synagogues, and in the courts. With this visibility came an increased number of heterosexual allies, people in positions of power able to influence mainstream organizations, as well as ordinary people whose children became friends with children of gay and lesbian parents, thereby learning about gay and lesbian families in ways that break down myths, stereotypes, and fear. In 1995, the American Psychological Association issued *Lesbian and Gay Parenting: A Resource for Psychologists*, a review of forty-three empirical studies and numerous other articles that concluded that "[n]ot a single study has found children of gay and lesbian parents to be disadvantaged in any significant respect relative to children of heterosexual parents."<sup>50</sup> In 1996 and 1999, the American Bar Association passed resolutions opposing use of sexual orientation as a basis for denying custody and adoption, respectively. In some parts of the country, joint and second-parent adoptions for lesbian and gay couples became routine, and lesbians and gay men were welcomed as adoptive and foster parents for the growing number of children needing good homes.

With increased visibility came increased political volatility. Legislatures had more opportunities to debate lesbian and gay parenting. Related issues concerning children and homosexuality, such as the con-

47. *Alison D. v. Virginia M.*, 572 N.E.2d 27 (N.Y. 1991); *Thomas S. v. Robin Y.*, 618 N.Y.S.2d 356 (App. Div. 1994); *Z.C.W. v. Lisa W.*, 84 Cal. Rptr. 2d 48 (Cal. Ct. App. 1999); *Jhordan C. v. Mary K.*, 224 Cal. Rptr. 530 (Cal. Ct. App. 1986).

48. *Liston v. Pyles*, 1997 Ohio App. LEXIS 3627 (1977); *Jones v. Fowler*, 969 S.W.2d 429 (Tex. 1998); *Titchenal v. Dexter*, 693 A.2d 682 (Vt. 1997); *Kazmierczak v. Query*, 1999 Fla. App. LEXIS 6355 (1999).

49. *In re H.S.H.-K.*, 533 N.W.2d 419 (Wis. 1995); *A.C. v. C.B.*, 829 P.2d 660 (N.M. 1992); *E.N.O. v. L.M.M.*, 711 N.E.2d 886 (Mass. 1999).

50. AMERICAN PSYCHOLOGICAL ASSOCIATION, *LESBIAN AND GAY PARENTING: A RESOURCE FOR PSYCHOLOGISTS* 8 (1995).

tent of school curricula, the sexual orientation of teachers and school board members, and whether gay men can serve as Boy Scout leaders, increasingly became subjects of public controversy. The debates over same-sex marriage often included heated discussion of childrearing by lesbians and gay men. Courts today considering the fate of lesbian and gay parents issue their rulings in this volatile context.

The greatest legal accomplishment for lesbian and gay parents in the 1990s was the availability in some parts of the country of joint and second-parent adoption. After many unreported trial court decisions in the last half of the 1980s, the first reported second-parent adoption by a lesbian couple occurred in 1991 in the District of Columbia.<sup>51</sup> Other reported decisions came shortly thereafter, and in early 1992 the first New York decision granting a second-parent adoption to a lesbian couple was reported in the *New York Times* and applauded on its editorial page.<sup>52</sup> Appeals courts in New York, New Jersey, Vermont, Massachusetts, Illinois, and the District of Columbia have approved such adoptions and instructed trial judges to grant them under the same best-interests-of-the-child standard used in all adoptions.<sup>53</sup> Appellate courts in only four states, Wisconsin, Colorado, Ohio, and Connecticut, have rejected such adoptions, in decisions narrowly construing their adoption statutes.<sup>54</sup> Trial courts in more than a dozen other states have granted such adoptions, and in some counties, such as those in the San Francisco Bay area, there have been hundreds, perhaps thousands, over the last fifteen years. In a 1997 settlement of a class action law suit, New Jersey became the first state in the country with a written agency policy requiring that gay, lesbian, and unmarried heterosexual couples be evaluated for joint adoption of children using the same criteria used for married couples.

From the mid-1990s on, the increasing, high profile coverage of lesbian and gay families provoked an escalation of efforts to prevent lesbians and gay men from adopting children and serving as foster

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51. *In re Adoption of Minor (T. and M.)*, 17 Fam. L. Rep. (BNA) 1523 (D.C. Super. 1991).

52. *In re Adoption of Evan*, 583 N.Y.S.2d 997 (N.Y. Sup. Ct. 1992); Ronald Sullivan, *Judge Lets Gay Partner Adopt Child*, N.Y. TIMES, Jan. 31, 1992, at B1; James D. Marks, *A Victory for the New American Family*, N.Y. TIMES, Feb. 1, 1992, at 21.

53. *In re Dana*, 660 N.E.2d 397 (N.Y. 1995); *In re Adoption of Two Children by H.N.R.*, 666 A.2d 535 (N.J. Super. Ct. App. Div. 1995); *In re Adoptions of B.L.V.B. and E.L.V.B.*, 628 A.2d 1271 (Vt. 1993); *In re Adoption of Tammy*, 619 N.E.2d 315 (Mass. 1993); *In re Petition of K.M. and D.M.*, 653 N.E.2d 888 (Ill. App. Ct. 1995); *In re M.M.D. & B.H.M.*, 662 A.2d 837 (D.C. 1995).

54. *In re Angel Lace M.*, 516 N.W.2d 678 (Wis. 1994); *In re Adoption of T.K.J.*, 931 P.2d 488 (Colo. 1996); *In re Adoption of Doe*, 1998 WL 904252 (Ohio Ct. App. 1998); *In re Adoption of Baby Z.*, 724 A.2d 1035 (Conn. 1999).

parents. Legislation proposing statewide bans on adoption and/or foster parenting were introduced between 1995 and 1997 in Oklahoma, Missouri, South Carolina, Tennessee, and Washington. None passed. In 1998, however, on the heels of the nationwide publicity accorded the settlement of the New Jersey litigation, prohibitions were proposed in Arkansas, Indiana, Texas, and Utah. Restrictions passed in Utah and Arkansas in 1999.<sup>55</sup>

Despite these setbacks, there were also positive legislative developments. In 1999 New Hampshire repealed its ban on lesbian and gay adoption and foster parenting.<sup>56</sup> Upon signing the bill into law, Governor Jeanne Shaheen commented that foster and adoptive families would now be selected based on fitness, "without making prejudicial assumptions."<sup>57</sup> Later in 1999, the Republican-controlled House of Representatives defeated an amendment that would have prohibited joint adoption by unmarried gay and heterosexual couples in the District of Columbia, even though the same language had passed in 1998.<sup>58</sup>

Although childrearing by openly gay men and women has become increasingly common, and although young gay men and lesbians have an increasing number of positive images and role models that allow them to affirm their sexual orientation, large numbers of adults still do not come out as gay or lesbian until after they have married and had children within heterosexual marriages. Their life stories look strikingly like those of their counterparts in the 1970s, and, as in earlier decades, their fate will be determined more than anything else by the state in which they live and the judge who hears their case.

The most visible custody dispute in the 1990s was the battle between Sharon Bottoms and her mother, Kay Bottoms, who challenged Sharon's right to continue raising her two year old son, Tyler, even though Sharon's former husband believed that Sharon should retain custody of the boy. Sharon lost at trial, but won in the Virginia Court of Appeals, in a decision that credited the years of research on the well being of children living with lesbian mothers.<sup>59</sup> The victory was short-lived, however, as the Virginia Supreme Court in 1995 reinstated the

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55. See A. Green, *Boards Adopts Ban on Gay Foster Parents*, ARKANSAS DEMOCRAT-GAZETTE, March 24, 1999, at B-3; R. Rivera, *Board Defends Its Ban on Gay Adoptions*, SALT LAKE TRIBUNE, October 30, 1999, at D2.

56. N.H. REV. STAT. ANN. §§ 170-B:2 to B:4, 170-F:2 to F:6 (1994) (repealed 1999).

57. *N.H. Law Repeals Ban on Gay Adoptions*, BOSTON GLOBE, May 4, 1999, at B5.

58. The House version did not become law in 1998 because it was deleted in the House-Senate Conference Committee.

59. *Bottoms v. Bottoms*, 444 S.E.2d 276 (Va. Ct. App. 1994).

trial court's ruling, which included a prohibition on Sharon's visitation with Tyler in the presence of her partner.<sup>60</sup>

The continuing vulnerability of lesbian and gay parents in some parts of the country was reinforced by a series of state supreme court decisions in 1998 and 1999 from Indiana, Missouri, North Carolina, Alabama, and Mississippi.<sup>61</sup> Each affirmed either a change in custody or a severe restriction on visitation rights based upon the parent's homosexuality. In one of the Alabama cases, custody was transferred from a mother who had raised her daughter with her partner for six years to a father who had remarried, in spite of the recommendation of the child's therapist that custody remain with the mother. The court condemned the mother for establishing "a two-parent home environment where their homosexual relationship is openly practiced and presented to the child as the social and moral equivalent of a heterosexual marriage," and concluded that the mother was exposing her daughter "to a lifestyle that is neither legal in this state, nor moral in the eyes of most of its citizens."<sup>62</sup>

To be sure, there were positive court decisions during the 1990s. A 1998 opinion from the highest court in Maryland overturned a trial judge's order that a gay father's partner be prohibited from being present during the father's visitation with his children,<sup>63</sup> in the process citing similar 1990s decisions from Illinois, Pennsylvania, and Washington.<sup>64</sup> Nonetheless, a review of reported disputes between gay and straight parents in the 1990s demonstrates that neither the increased visibility of lesbian and gay families, nor the mental health research on the well-being of children raised by lesbian and gay parents, nor the successes in the areas of adoption and foster-parenting have decreased the risks to a lesbian mother or gay father battling a heterosexual former spouse over custody or visitation. It is as true at the turn of the millennium as it was in the 1970s that the result of such a dispute depends largely on where the case goes to court.

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60. *Bottoms v. Bottoms*, 457 S.E.2d 102 (Va. 1995).

61. *Marlow v. Marlow*, 702 N.E.2d 733 (Ind. Ct. App. 1998); *J.A.D. v. F.J.D.*, 978 S.W.2d 336 (Mo. 1998)(en banc); *Pulliam v. Smith*, 501 S.E.2d 898 (N.C. 1998); *In re J.B.F. and J.M.F.*, 730 So. 2d 1190 (Ala. 1998); *Wiegand v. Houghton*, 730 So. 2d 581 (Miss. 1999).

62. *J.B.F. v. J.M.F.*, 730 So. 2d 1190 (Ala. 1998).

63. *Boswell v. Boswell*, 721 A.2d 662 (Md. 1998).

64. *In re Marriage of Pleasant*, 628 N.E.2d 633 (Ill. App. Ct. 1993); *Blew v. Verta*, 617 A.2d 31 (Pa. Super. Ct. 1992); *In re Marriage of Wicklund*, 932 P.2d 652 (Wash. Ct. App. 1996).